RECENT DECISIONS.

ADMINISTRATIVE LAW—DE FACTO OFFICER—RIGHT TO SALARY.—A Statute provided that the governor should not appoint a superintendent of irrigation for any water district, until requested by a county situated therein. The plaintiff sued for salary earned as a commissioner of irrigation. No county in the district had requested the appointment. *Held*, that the plaintiff was at least a *de facto* officer, and his title to the office could not be determined in any collateral proceeding. *Board of Com'rs of Montezuma County* v. *Wheeler* (Colo. 1907) 89 Pac. 50.

This decision is reached by the court without discussion or citation of any authority, and is clearly erroneous. Although the acts of a *de facto* officer are valid as to third parties, and cannot be impeached collaterally, *Plymouth* v. *Painter* (1846) 17 Conn. 585, yet a valid legal title to the office is essential if he is asserting any rights for himself, *People ex rel. Armstead* v. *Nostrand* (1871) 46 N. Y. 375, or seeks to recover the salary. *People ex rel. Culbertson* v. *Potter* (1883) 63 Cal. 127; *Phelon* v. *Granville* (1886) 140 Mass. 386; *Romero* v. *U. S.* (1889) 24 Ct. Cl. 331; Mechem, Pub. Off., §§ 328, 330, 331; Throop, Pub. Off., §§ 517, 622, 661.

ADMIRALTY—LIMITATION OF LIABILITY—INJUNCTION AGAINST SUIT IN STATE COURT.—The plaintiff's intestate was killed while on board ship, and the plaintiff brought an action for damages in a state court under a wrongful death statute. The defendant then came into the District Court, filed a petition for a limitation of liability under § 4283 Comp. Stat. U. S. 1901, by an *ex parte* proceeding had the ship appraised and obtained an order restraining the prosecution of the suit in the state court. The plaintiff now moves to have the injunction dissolved. *Held*, the injunction would be set aside. *The Lotta* (1907) 150 Fed. 219.

In *Quinlan* v. *Pew* (1893) 56 Fed. 111, and *The McCaulley* (1899) 99 Fed. 302, petitions to limit liability for injuries to a single person were granted on the theory that the owner of a vessel might by the verdict of a common law jury be compelled to pay damages in excess of the value of the vessel. But *The Rosa* (1892) 53 Fed. 132, and *The Eureka* (1901) 108 Fed. 672, take the view of the principal case, obviating the difficulty suggested by allowing the defendant to plead § 4283 in the State court. *Loughin* v. *McCaulley* (1898) 186 Pa. St. 517. The latter view is preferable, as it gives effect to § 4284 Comp. Stat. U. S. 1901, which shows the legislative intention to give jurisdiction to the federal courts only when injury has been done to more than one person, and to § 563 subd. 8, which saves "to suitors in all cases the right of the common law remedy where the common law is competent to give it."

BANKRUPTCY—LIMITATION OF TIME TO PROVE CLAIMS—LIQUIDATION BY LITIGATION.—The bankrupt gave the claimant a mortgage to secure notes. Adjudication of bankruptcy occurred June, 1904. In October, 1905, judgment was rendered against the claimant in an action on the mortgage, and on November 10, 1905, the proof of claim was offered. § 57n of the Bankruptcy Act provides that if claims "are liquidated by litigation and the final judgment therein is rendered within thirty days after the expiration of" one year after the adjudication, they may be proved within sixty days of said final judgment. *Held*, that this claim was liquidated by litigation, and the statute must be construed as meaning "if the final judgment is rendered at any time after the expiration of one year." *Powell* v. *Leavitt* (1907) 150 Fed. 89.

This decision unwarrantably misinterprets the statute. The one year limitation is prohibitory, *In re Rhodes* (1900) 105 Fed. 231; *In re Kemper* (1905) 142 Fed. 210, and leaves the court no discretion. *Matter*

of Ingalls Bros. (1905) 142 Fed. 517. The claimant's action upon the mortgage was not a liquidation of his claim on the notes, as the amount was not in controversy. *In re Thompson's Sons* (1903) 123 Fed. 174; *Matter of Prindle Co.* (S. D. N. Y. 1903) 10 Am. Bankr. Rep. 405. The rights of all parties can be preserved by filing the claims within the year, and postponing their allowance in the discretion of the court. *In re Mertens & Co.* (1906) 147 Fed. 177, 180. Cf. *Buckingham* v. *Estes* (1904) 128 Fed. 584; *In re Roeber* (1903) 127 Fed. 122. Upon a state of facts similar to that in the principal case the contrary and correct result has recently been reached. *In re Baird* (1907) 150 Fed. 600.

BANKRUPTCY—PRIORITY—FRANCHISE TAX.—A corporation organized under the laws of New Jersey, but doing no business and holding no property there, was adjudged a bankrupt in Illinois. The state of New Jersey claimed a priority payment of its franchise tax under Section 64a of the Bankruptcy Act. *Held*, the tax was entitled to priority. *New Jersey* v. *Anderson* (1906) 27 Sup. Ct. 137.

If the highest court of a State has decided that its statute imposes no true tax, the federal courts will not grant priority of payment for such impositions. *In re Ott* (1889) 95 Fed. 274. In New Jersey, *Hancock* v. *Singer Mfg. Co.* (1898) 62 N. J. L. 289, apparently decided that the annual franchise charge was a tax; and this decision was relied on in *In re Mutual Mercantile Agency* (S. D. N. Y. 1902) 8 Am. Bank. Rep. 435, and in the principal case. But *In re U. S. Car Co.* (1899) 60 N. J. Eq. 514, pointed out that the franchise tax was not a tax, but an arbitrary imposition; and this case is followed in *In re Danville Rolling Mill* (1903) 121 Fed. 432, and *In re Cosmopolitan Power Co.* (1905) 137 Fed. 858. The latter view represents the New Jersey law; *Hancock* v. *Singer Mfg. Co.*, supra, being based on the peculiar provisions of a charter. The claim was, however, seemingly entitled to priority as a debt under § 64, subd. 5, in accordance with the State statute. Gen. Stat. N. J. p. 3335, § 251.

CONFLICT OF LAWS—DOMESTIC RELATIONS—LEGITIMACY.—The father of the appellant, after deserting his wife in New York, by whom he had three children, purported to marry appellant's mother in New Jersey. After the birth of appellants, their parents removed to Michigan, acquired a domicil there, and the father, having there obtained a divorce, valid in Michigan, but invalid in New York, where the first wife still resided, remarried the New Jersey woman. Thereby, according to a Michigan statute, the appellant became legitimate. The appellant claimed to divide New York realty with the children of the first marriage, under a devise, as the "lawful issue" of their father. *Olmsted* v. *Olmsted* (N. Y. App. Div. 1907) 36 N. Y. L. Jour. No. 137.

The decision in the principal case is unassailable. Legitimacy may be conferred by the sovereign power quite apart from marriage. *McDeed* v. *McDeed* (1873) 67 Ill. 545; *Miller* v. *Miller* (1883) 91 N. Y. 315; *Scott* v. *Key* (1856) 11 La. 232. Once acquired it survives any change of domicil. *Dayton* v. *Adkisson* (1889) 45 N. J. Eq. 603; *DeWolff* v. *Middleton* (1893) 18 R. I. 810; *Fowler* v. *Fowler* (1902) 131 N. C. 169. It has been decided in New York that a status acquired in another state may give capacity to inherit in New York; *Miller* v. *Miller*, supra; *Matter of Hall* (1901) 61 App. Div. 266; and the principal case decides no more; for neither the status nor the vested rights of the New York children were affected, *People* v. *Baker* (1879) 76 N. Y. 78, as they still remained his heirs, and they had, prior to their father's death, no vested interest in his estate.

CONSTITUTIONAL LAW—GOVERNMENTAL LICENCES—REVOKING WITHOUT A HEARING.—The plaintiff held a license to sell milk, in accordance with an ordinance, which license was revoked without the authority of any ordinance, although a statute allowed breaches of the "Sanitary Code"

to be punished by fines, imprisonments or forfeitures. *Held*, that the revocation was void, part of the court basing their decision upon the ground that in the absence of an ordinance authorizing the Board of Health to act, it had no right to take any action, but part also declaring that it "could not be revoked in any event without notice to the relator and a hearing." *People* v. *Dep't. of Health* (1907)103 N. Y. Supp. 275. See NOTES, p. 414.

CONSTITUTIONAL LAW—TAXATION OF TRANSFERS BY POWERS—NEW YORK TRANSFER TAX.—A deeded property to B for life, remainder over to C and D in fee but with power in B to appoint the remainder by will between C and D. After the passage of the Amendment to the Transfer Tax, Chap. 284, Laws of N. Y. 1897, providing for a transfer tax upon "the exercise of a power of appointment derived from any disposition of property made either before or after the passage" of the Act, B died and by will appointed C. Under the above Act the transfer to C was taxed. *Held*, the tax was constitutional. *Chanler* v. *Kelsey* (U. S. Sup. Ct. 1907) 37 N. Y. Law Jour., No. 25. See NOTES, p. 423.

CONTRACTS—DIFFERENT ASSIGNEES OF SAME RIGHT—ESTOPPEL.—A corporation contracted with a town to build a bridge, payment to be made after one year, and assigned the contract for value to the H. Bank, which permitted the corporation to retain the original written contract, and authorized it to collect what was due on it. The corporation built the bridge and received a non-negotiable town-warrant to its own order, payable in one year, which, soon after, it assigned to the W. Bank, an innocent purchaser for value. Shortly before the maturity of the warrant, both the H. Bank and the W. Bank gave notice to the town; which interpleaded them. *Held*, the H. Bank was estopped to set up its prior equity against the W. Bank. *Washington Township* v. *First Nat'l Bank* (Mich. 1907) 111 N. W. 349.

Mere possession of a corporeal chattel, or of the evidence of a non-negotiable chose in action, does not enable the possessor to give a greater title than he has. *Osborn* v. *McClelland* (1885) 43 Oh. St. 284. But if the true owner clothes the possessor with the indicia of title, he will be estopped to set up his own title against persons who innocently rely thereon. *Pickering* v. *Busk* (1812) 15 East 38. In the principal case the corporation's possession of the contract, and exchange for a warrant in its own name, according to the custom of trade proclaimed its ownership of the right, on which the W Bank relied, and for this the plaintiff was responsible; *Saltus* v. *Everett* (1838) 20 Wend. 267; cf. *McNeil* v. *Tenth Nat'l Bank* (1871) 46 N. Y. 325; and thus the H. Bank was estopped from setting up its equity, which being equal and prior in time, would ordinarily have prevailed. *Williams* v. *Ingersoll* (1882) 89 N. Y. 508.

CONTRACTS—PAR DELICTUM.—The plaintiff, a city alderman, sought to enjoin the performance of a contract between the city and another alderman as being prohibited by the State Constitution. It was contended in defense that the plaintiff had engaged in a similar transaction. *Held*, the plea constituted no defense. *Noxubee Co.* v. *City of Macon* (Miss. 1907) 43 So. 304. See NOTES, p. 416.

CONTRACTS—PERSONAL EMPLOYMENT—MEASURE OF DAMAGES UPON WRONGFUL DISMISSAL.—The plaintiff having been engaged for a certain period was dismissed in the middle of that period, and sued upon the express contract. *Held*, the measure of the plaintiff's damages should be the whole contract wages. *Thurmond* v. *Skannal* (La., 1907) 42 So. 577. See NOTES, p. 408.

CORPORATIONS—NAME OF FOREIGN CORPORATION.—A bill was filed to have all mail addressed to "Central Trust Co." delivered to the plaintiff. The plaintiff, a foreign corporation, had been doing business in Illinois

for a number of years, but did not comply with the enabling act until 1903. The defendant was a domestic corporation organized under a similar name in 1902. *Held*, the bill would be dismissed. *Central Trust Co.* v. *Central Trust Co. of Illinois* (1906) 149 Fed. 789.

Ordinarily a corporation may exercise its powers abroad as well as at home, and so would have the right of protection in the exclusive use of its name, in a proper case. *Farmers' Loan & Trust Co.* v. *Farmers' Loan & Trust Co. of Kansas* (1888) 1 N. Y. Supp. 44; see 7 COLUMBIA LAW REVIEW 120. But a state may entirely exclude a foreign corporation, *Am. Ins. Co.* v. *Stoy* (1879) 41 Mich. 385, or admit or retain it only on certain conditions. *Waters-Pierce Oil Co.* v. *Texas* (1900) 177 U. S. 28. By granting a similar name to a domestic corporation, the state would seem to have put the foreign corporation to its election to remain or not under those circumstances: *Hazleton Boiler Co.* v. *Tripod Boiler Co.* (1892) 142 Ill. 494; and as this was the situation when the plaintiff was formally admitted, it must be taken to have qualified with reference to these conditions. *Amer. Clay Mfg. Co.* v. *Amer. Clay Mfg. Co.* (1901) 198 Pa. St. 189. As, therefore, the defendant had the right to use the name in question in Illinois primarily, and no fraud being shown, *Hazleton Boiler Co.* v. *Tripod Boiler Co.*, supra, 505; *Cont. Ins. Co.* v. *Cont. Fire Ass'n* (1900) 101 Fed. 255, 256, the principal case is correctly decided.

CORPORATIONS — STOCKHOLDERS' STATUTORY LIABILITY — EFFECT OF TRANSFER OF SHARES.—The defendant had transferred his stock in good faith to a person who thereafter became insolvent. Upon the subsequent insolvency and winding-up of the corporation, an assessment of twenty-six per cent. was made upon all the stockholders. *Held*, that the creditors could not hold the defendant upon his statutory liability, for debts contracted while he was a stockholder, until all the present solvent stockholders had been assessed to the full amount of their stock. *Poston* v. *Hull* (Ohio 1907) 80 N. E. 11. See NOTES, p. 421.

CORPORATIONS—ULTRA VIRES CONTRACT—DEFINITION OF BENEFIT.—The defendant, a national bank, guarantied a loan made by the plaintiff to a third party. A part of the money so obtained was paid by the third party to the defendant in consequence of a prior arrangement between them. An action was brought on the guaranty. *Held*, that the contract, being ultra vires, was void and unenforcible. *Appleton* v. *Cit. Cent. Nat. Bank* (1906) 101 N. Y. Supp. 1037.

An action upon an ultra vires contract was allowed in *Bissell* v. *Ry. Co.* (1860) 22 N. Y. 258, on the ground that the corporation could not plead its incapacity after enjoying the benefits of the contract; and this doctrine has been consistently maintained in New York. *Linkauf* v. *Lombard* (1893) 137 N. Y. 417; *Bath Gas Light Co.* v. *Claffy* (1896) 151 N. Y. 24; *Vought* v. *Loan Ass'n* (1902) 172 N. Y. 508. The principal case, while containing erroneous dicta, appears to establish the strict rule that the corporation must receive the benefit under the unauthorized contract itself, and not merely as an incidental consequence thereof. On this ground the principal case must be distinguished from the very similar case of *Bushnell* v. *Nat. Bank* (N. Y. 1877) 10 Hun. 378, where all the parties seemingly joined in a tri-partite contract.

DAMAGES—FRAUD—LICENSE.—The defendant for a consideration granted the plaintiff a license to construct a logging road over some land of which the defendant fraudulently misrepresented himself to be the owner. After the road had been constructed, he revoked the license. *Held*, the plaintiff might recover in an action of deceit the cost of constructing both the original road and the subsequent road which the defendant's failure of title forced him to build elsewhere. *Storseth* v. *Folsom* (Wash. 1907) 88 Pac. 632.

The doctrine of *Rerick* v. *Kern* (Pa. 1826) 14 S. & R. 267 does not obtain in Washington. *Hathaway* v. *Yakima Power Co.* (1896) 14 Wash.

469. Consequently, to compel the defendant to make good his representations, Sutherland, Damages, 3rd Ed., § 1171, would still leave the license revocable; and the plaintiff's recovery could at the most include whatever consideration he had paid and the prospective damages which the real owner might recover in trespass against him. See *Smith* v. *Bolles* (1889) 132 U. S. 125; *Case* v. *Hall* (1840) 24 Wend. 102; *M. E. R. Co.* v. *Kneeland* (1890) 120 N. Y. 134. The principal case is indistinguishable from *Hathaway* v. *Yakima Power Co.*, supra, and is unsound.

DOMESTIC RELATIONS—INFANTS—SUPPORT WHEN CUSTODY AWARDED TO WIFE.—The plaintiff sued for an allowance for the support of minor children whose custody had been awarded to her by a divorce decree. *Held*, the former husband was liable for the necessary expenses of the children. *Graham* v. *Graham* (Col. 1907) 88 Pac. 852.

The principle that the right to the services of the children and the obligation to maintain them go together, while held decisive in some cases, *Husband* v. *Husband* (1879) 67 Ind. 583, is not applied in many well-reasoned cases, on the ground that the father is deprived of the custody of the children by his own fault, and that he should not be allowed to plead his own wrong to avoid his primary liability. *Pretzinger* v. *Pretzinger* (1887) 45 Oh. St. 452; *Holt* v. *Holt* (1883) 42 Ark. 495; *Plaster* v. *Plaster* (1868) 47 Ill. 290; *Gibson* v. *Gibson* (1898) 18 Wash. 489; but see contra, *Hampton* v. *Allee* (1896) 56 Kan. 461; *Brow* v. *Brightman* (1883) 136 Mass. 187. The principal case is in line with the better weight of authority. 2 Bishop, Mar., Div., and Sep., § 1223.

EMINENT DOMAIN—PUBLIC USE—LIGHT AND POWER PLANT.—An action was brought for the condemnation of land for a dam and pond which were to be used in connection with an electric light and power plant. The intention of the complainant was to furnish electricity for lighting and power, and water for irrigation purposes, to the public generally. *Helena Power Co.* v. *Spratt* (Mont. 1907) 88 Pac. 773.

The right to condemn property for the purpose of an electric light and power plant has generally been denied on the ground that it was not a public use, *Brown* v. *Gerald* (1905) 100 Me. 351; *Avery* v. *Vermont Co.* (1903) 75 Vt. 235, even when the corporation had made an agreement to furnish light to a city. *State* v. *Superior Court* (Wash. 1906) 85 Pac. 666. At present, however, there is a tendency to take the contrary view, not only where there is an intention to make a contract to supply a municipal corporation with power, *Brown* v. *Power Co.* (1905) 140 N. C. 333; *Jones* v. *Electric Co.* (1906) 125 Ga. 618, but also where the intention was to supply only the public generally. *Rockingham Power Co.* v. *Hobbs* (1904) 72 N H. 531. The principal case was properly decided, as the court took into consideration the local conditions; and the question of a public use should be decided on the particular facts and circumstances in each case. *Strickley* v. *Highland Boy Mining Co.* (1906) 200 U. S. 527; *Clark* v. *Nash* (1905) 198 U. S. 361.

EQUITY—INJUNCTION—UNLAWFUL INTERFERENCE WITH TRADE.—The defendant was an association of merchants who were endeavoring to drive out peddlers. Armed agents of the defendant followed the employees of the plaintiff and interfered with them when dealing with prospective customers. *Held*, an injunction would issue. *Spaulding* v. *Evenson* (1906) 149 Fed. 913.

There are two extreme views as to the extent of the right to immunity from interference with the formation of contracts. One is that the act cannot be a tort merely by infringing this right; it must be a substantive tort per se. Rep. Royal Comm'rs, Trade Disputes (1906) 46–50. The other is that interference can be justified only in extraordinary circumstances. CAVE, J., in *Allen* v. *Flood* (1898) A. C. 1, 37. A sounder view is that the act is a tort, but may be justified when the defendant has an interest, and public rights are not jeopardized. 20 Harv. Law Rev. 361;

Berry v. *Donovan* (1905) 188 Mass. 353; *Erdman* v. *Mitchell* (1903) 207 Pa. St. 79; 1 Eddy, Combinations 416. The first view is too extreme and has met with no support in this country. Whichever of the other views is taken as to the liability of an individual for interference with contract rights, the principal case may be supported in that here was an act made oppressive and dangerous which, if it proceeded from but a single person might be innocent, but, proceeding from a great number, created a new and additional power to cause injury. 7 COLUMBIA LAW REVIEW 246; *Quinn* v. *Leatham* (1901) A. C. 495, 510, 511. While this cannot apply in New York, *Green* v. *Davies* (1905) 182 N. Y. 499, and the strict tort view of wrongful interference with contracts is not taken there, *Nat. Prot. Ass'n* v. *Cummings* (1902) 170 N. Y. 315, the latter case may be distinguished, as in the principal case the purpose of the defendants was not immediate competition. *Beattie* v. *Callanan* (N. Y. 1903) 82 App. Div. 7.

EQUITY—INJUNCTION IN FORECLOSURE SUIT AGAINST BONDHOLDERS—CONTEMPT.—In a foreclosure action in a federal court, individual bondholders under a trust deed, whose trustee was a party defendant to the action, and whose mortgage had been declared invalid, filed objections to the confirmation of the sale of the property. Their objections were overruled, and an injunction issued restraining them from asserting any claim against the purchasers. They brought an action in a state court to foreclose their alleged mortgage, notwithstanding the former adjudication. They were pronounced in contempt by the federal court. *Held*, on appeal, the injunction did not bind the bondholders personally, as filing the objections did not give the court jurisdiction over their persons. *Lewis* v. *Peck* (C. C. A. 1907) 37 Chicago Legal News 299.

The determination of the point discussed seems correct, as the bondholders did not make themselves parties to the action. *Gould* v. *Mortimer* (N. Y. 1863) 16 Abb. Pr. 448; *Watson* v. *Fuller* (N. Y. 1854) 9 How. Pr. 425. But it would seem that the injunction might be binding on other grounds. As the bondholders were fully represented in the litigation by their trustee, and were admittedly bound as to the res, *McElrath* v. *R.R. Co.* (1871) 68 Pa. St. 37; *Board of Supervisors* v. *R.R. Co.* (1864) 24 Wis. 93, and as others than those over whom the court has acquired personal jurisdiction may be bound personally, *Fowler* v. *Beckman* (1891) 66 N. H. 424, as agents, *Wellesley* v. *Mornington* (1848) 11 Beav. 181, and employees, *Toledo, etc., Ry.* v. *Penn. Co.* (1893) 54 Fed. 746, 757, or those claiming under parties to the record, as subsequent assignees or lessees, *Batterman* v. *Finn* (N. Y. 1864) 34 How. Pr. 108, it would seem that those holding as cestuis qui trustent under a party to the record might be bound personally by an injunction directed against them.

EQUITY—REFORMATION—EXECUTED CONTRACT.—The plaintiff erected stokers for the defendant, warranted to burn coal which would pass over a certain mesh. The parties contemplated coal sold in the vicinity of the defendant's plant, which did not correspond to the description in the written warranty. The stokers conformed to the written warranty, but not to the parties' understanding of the warranty. The defendant sought reformation of the warranty for purposes of set-off. *Held*, reformation would not be granted. *Westinghouse C. K. & Co.* v. *Salt Co.* (1906) 101 N. Y. Supp. 303.

When parties have voluntarily chosen the language of a written contract, they must be bound by the words according to their intent and meaning. *Dixon* v. *Clayville* (1876) 44 Md. 573, 578; *Trapp* v. *Moore* (1852) 21 Ala. 693. But a court of equity has power to grant relief where the meaning of the parties, already expressed and understood as between themselves, is not correctly expressed by the writing, in consequence of a mutual mistake of fact. *Smith* v. *Jordan* (1868) 13 Minn. 264; *Talley* v. *Courtney* (Tenn. 1870) 1 Heisk. 715; *Bradford* v.

Union Bank (1857) 13 How. U. S. 57. If the facts in the principal case justify the latter inference, the defendant should not be deprived of his right to damages even though the contract was executed, unless, indeed, the plaintiff was misled by negligence on the defendant's part, *Duke of Beaufort* v. *Neald* (1845) 12 Cl. & F. 248, 286; *Western R.R.* v. *Babcock* (Mass. 1843) 6 Met. 346, as the defective performance would be due to the plaintiff's independent mistake in forgetting the true meaning of the agreement. *Butler* v. *Barnes* (1891) 60 Conn. 170; *Smith* v. *Jordan*, supra. Furthermore, if the plaintiff had performed according to the true intent of the parties, the defendant would not have been permitted to recover on the written warranty; *West* v. *Suda* (1897) 69 Conn. 60; *Gooding* v. *McAllister* (N. Y. 1853) 9 How. Pr. 123; and it is unfair to permit the plaintiff to perform either way at his option, and give the defendant no redress in any case.

EQUITY—RESTRICTIVE CONTRACT—INJUNCTION AGAINST PURCHASER FROM MORTGAGOR.—The owner of hotel property mortgaged the property to secure the repayment of a loan and the performance of a contract that no other beer than that of the mortgagee should be sold on the premises. An injunction was sought against the purchaser of the property with notice of the contract, to restrain its breach by him. *Held*, the remedy at law for damages was entirely adequate. *Hardy* v. *Allegan, Circuit Judge* (Mich. 1907) 111 N. W. 166.

A contract concerning the use of land impresses on the property an equity which binds the subsequent purchaser with notice. *Lewis* v. *Gollner* (1891) 129 N. Y. 227; *Tulk* v. *Moxhay* (1848) 2 Ph. 774. As the contract was not in form of covenant it could at law under no circumstances bind the purchaser; *Kennedy* v. *Owen* (1884) 136 Mass. 199; and where only an equitable right exists, equity will furnish a remedy. I Pomeroy, Eq. Jur. 703. Even could an action be maintained at law, the remedy would be inadequate as there would be a continuing breach and full justice could be obtained only by a succession of actions. *Manhattan Mfg. Co.* v. *N. J. Stockyard Co.* (1872) 23 N. J. Eq. 161; *Steward* v. *Winters* (N. Y. 1847) 4 Sandf. Ch. 587. While the remedy could be obtained on the foreclosure of the mortgage, yet, as the contract cannot be fairly construed in the alternative, to keep the promise or pay damages, *Woodward* v. *Gyles* (1690) 2 Vern. 119; *Smith* v. *Bergengren* (1891) 153 Mass. 236, equity will enforce the contract according to the intentions of the parties. *Diamond Match Co.* v. *Roeber* (1887) 106 N. Y. 473; *Watrous* v. *Allen* (1885) 57 Mich. 362, 368. Injunctions have frequently been granted in like cases. *Ferris* v. *American Brew. Co.* (1900) 155 Ind. 539; *Catt* v. *Tourle* (1869) L. R. 4 Ch. App. 654; *Johns Bros. Abergarw Brew. Co.* v. *Holmes* [1900] 1 Ch. 188.

EVIDENCE—VARYING WRITTEN CONTRACT BY PAROL.—A sample of the stone, and a statement of the quarry from which it was to be obtained, were made part of a contract to furnish stone. In an action against the contractor's surety, defendant attempted to prove by parol that the contract contemplated stone on certain premises under the control of the plaintiff, which stone the contractor had engaged to remove; and that the default was due to plaintiff's neglect to obtain an extension of its lease. *Held*, Coxe, J. dissenting, that this evidence was inadmissible. *U. S.* v. *Conkling* (1907) 36 N. Y. L. J. No. 8.

Parol evidence is admissible to ascertain the subject matter of a contract. *The Mayor etc. of N. Y.* v. *Butler* (N. Y. 1847) 1 Barb. 325; *Mason* v. *Spalding* (D. C. 1889) 7 Mack. 115; *Reid* v. *Ins. Co.* (1877) 95 U. S. 23. The case on which the dissenting opinion is founded, *U. S.* v. *Peck* (1880) 102 U. S. 64, may be explained on this principle. But admitting, in the principal case, that the subject matter was as claimed by defendant, he was not, as in *U. S.* v. *Peck*, supra, prevented from obtaining such subject matter, being at liberty to obtain the stone from the owner of the premises. To allow a recovery, the plaintiff must be

considered as being bound to secure to the defendant the right to take the stone; which would add another term to a written contract by parol. *Arthur* v. *Baron de Hirsch Fund* (1903) 121 Fed. 791; *Naumberg* v. *Young* (1882) 44 N. J. L. 331.

EVIDENCE—VIEW OF PREMISES BY COURT.—In an action to quiet title to land, in which the question involved was whether the land had been added to the property by the gradual recession of a river, the court viewed the premises. *Held*, that the knowledge gained by the court from such view was independent evidence. *Hatton* v. *Gregg* (Cal. 1906) 88 Pac. 592.

The prevailing doctrine is that a view is granted only to enable the court or jury better to understand and apply the evidence given in court; *Chute* v. *State* (1873) 19 Minn. 271; *Close* v. *Samm* (1869) 27 Ia. 503; *Machader* v. *Williams* (1896) 54 Oh. St. 344; and such view does not furnish independent evidence as to facts material to the issue. *L. S. & M. S. Ry. Co.* v. *Gaffney* (1894) 9 Oh. Cir. Ct. 32; *Heady* v. *Turnpike Co.* (1875) 52 Ind. 117; *Schultz* v. *Bower* (1894) 57 Minn. 493; *Chute* v. *State*, supra. A contrary doctrine is held in cases for the condemnation of land. *Mitchell* v. *Coal Co.* (1877) 85 Ill. 566; *U. S.* v. *Seufert Bros. Co.* (1898) 87 Fed. 35; *Seattle & Mont. Ry. Co.* v. *Roeder* (1902) 30 Wash. 244. The distinction rests upon a difference in the statutes regulating views in the two classes of cases. *Vane* v. *Evanston* (1894) 150 Ill. 616. The principal case is based upon, but goes beyond, *People* v. *Milner* (1898) 122 Cal. 171; as that case seems to lose sight of the distinction referred to above, it would have been better to have given a contrary decision on the authority of *Wright* v. *Carpenter* (1875) 49 Cal. 607.

MUNICIPAL CORPORATIONS—LIMITATION OF INDEBTEDNESS—MUELLER LAW CERTIFICATES.—The City of Chicago sought to issue "street railway certificates," principal and interest to be paid by the income from street railway property to be acquired with the money thus raised. A trust deed of the property was to be given, including the right to operate the railroad, to secure due payment. The loan if it constituted a debt, exceeded the constitutional limitation. *Held*, the certificates were invalid. *Lobdell* v. *Chicago* (Ill. 1907) 34 Nat. Corp. Rep. 327.

Not only indebtedness payable on the general credit of the municipality, *Litchfield* v. *Brown* (1884) 114 U. S. 190, but also a loan secured by a special tax, *Kiehl* v. *South Bend* (1896) 44 U. S. App. 687, or designated property, *Baltimore* v. *Gill* (1869) 31 Md. 375, come within the constitutional inhibition. But if the money is to be repaid out of current taxes, *McNeal* v. *Waco* (1895) 89 Tex. 83, or out of property acquired with the money borrowed, *Kelly* v. *Minneapolis* (1895) 63 Minn. 125, the limitation of indebtedness does not apply, as in such case the municipality is in no different position than before the loan. In the principal case the City of Chicago already had the power to grant the franchise in question, Ill. R. S. ch. 24, § 62, and thus made itself liable to give up a valuable right in repayment of the loan; and it being impossible to distinguish the valid from the invalid portion of the loan, the whole would be invalid; *Millerstown* v. *Frederick* (1886) 114 Pa. St. 435; but this result could have been avoided if the power to give this franchise had been withdrawn from the City before the Mueller Law was enacted. See, *People* v. *Morris* (1835) 13 Wend. 325; *State* v. *Savannah* (Ga. 1829) R. M. Charlt. 250; *Mayor* v. *Groshon* (1869) 30 Md. 436; *Florida* v. *R.R. Co.* (1892) 29 Fla. 590; *People* v. *Kerr* (1863) 27 N. Y. 188; *East Hartford* v. *Hartford Bridge Co.* (1850) 10 How. U. S. 511.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION MAKER—DISCHARGE BY EXTENSION OF TIME.—Defendant signed a joint promissory note as an accommodation maker, adding the word "surety" to his name; after maturity the principal maker by a new agreement secured an extension of time without the knowledge or consent of defendant. *Held*, the

defendant was not discharged from liability by such extension of time, under the Negotiable Instruments Law. *Cellers* v. *Meachem* (Ore. 1907) 89 Pac. 426.

Before the enactment of the Negotiable Instruments Law, it was generally held that extension of time released one known to be an accommodation maker, when extension was given without his consent; *Hubbard* v. *Gurney* (1876) 64 N. Y. 457; *Am. & Gen. Mtge. & Inv. Corp.* v. *Marquam* (1894) 62 Fed. 960; but it seems that the principal case has correctly construed the Negotiable Instruments Law in holding that the existing law was thereby changed on this point. By this statute an accommodation maker "is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party;" Neg. Inst. L. (N. Y.) §55; and the person "primarily" liable "is the person who by the terms of the instrument is absolutely required to pay the same." § 3, id. No provision is made for the discharge of one primarily liable by extension of time, which releases only those secondarily liable. § 201, id. The statute received a similar construction in *Vanderford* v. *Farmers' & Mech. Nat. Bk.* (Md. 1907) 66 Atl. 47, and in *National Citizens' Bank* v. *Toblitz* (1903) 81 N. Y. App. Div. 593, affirmed expressly on other grounds (1904) 178 N. Y. 464.

PATENTS—INFRINGEMENT—PLAINTIFF'S NON-USER FOR WRONGFUL PURPOSE.—An action was brought to prevent the infringement of a patent, the plaintiff having suppressed its use for the purpose of protecting another patent from competition. *Held*, Aldrich J. dissenting, an injunction would issue. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.* (1906) 150 Fed. 741.

A patent is primarily intended to confer a monopoly on the patentee, *Grant* v. *Raymond* (1832) 6 Pet. 218, and the law has enabled the owner to deal with it in the same manner as property of any other description. *Wilson* v. *Easton* (1846) 4 How. U. S. 646. Although the grant of a patent is made on the supposition that it will be put to a practical use, "if the owner will neither use the patent, nor permit others to use it, he has but suppressed his own." *Heaton etc. Button Fastener Co.* v. *Eureka Co.* (1898) 47 U. S. App. 146. Even if the plaintiff's action was intrinsically inequitable, yet as it did not affect the relations, or arise out of the transaction between the parties, the defendant could not take advantage of it. *Lewis's Appeal* (1870) 67 Pa. St. 153, 166; *Kinner* v. *Ry. Co.* (1903) 69 Oh. St. 339. Thus, an injunction has been granted where the plaintiff used the patent in violating the Anti-Trust Act, *General Electric Co.* v. *Wise* (1903) 119 Fed. 922, and licensed its use for an unlawful purpose. *Fuller* v. *Bergen* (1903) 120 Fed. 274. The principal case, therefore, reaches the correct conclusion.

PLEADING AND PRACTICE—CAUSES OF ACTION—INSTALMENT CONTRACT.—In an action for breach of an instalment employment contract, the plaintiff claimed the amount due him under the contract at the time of his dismissal together with damages for the wrongful dismissal. An order was entered denying a motion that the causes of action be separately stated in the complaint. *Held*, as there were two causes of action, the order was erroneous. *Carlson* v. *Albert* (1907) 102 N. Y. Supp. 944.

The decision in the principal case, while correct in principle, 6 COLUMBIA LAW REVIEW 584, is directly contrary to the New York decisions which hold that all claims due under an entire contract at the time the suit is brought constitute one cause of action. *Pakas* v. *Hollingshead* (1906) 184 N. Y. 411.

PLEADING AND PRACTICE—FINAL DECISION—ORDER TO PRODUCE BOOKS.—In an action against a railroad company for an alleged violation of the Interstate Commerce Act, the plaintiff obtained an order requiring certain of its officers to produce before and at the trial books and papers of the

defendant. *Held*, Buffington J. dissenting, such order was a final decision, and reviewable on a writ of error. *Cassatt* v. *Mitchell Coal & Coke Co.* (1907) 150 Fed. 32.

Under the American practice, a writ of error is allowed only from a final decision, *Trustees* v. *Greenough* (1881) 105 U. S. 527, but in determining whether a decree is final the court will consider the substance of what is done by such decree. *Potter* v. *Beal* (1892) 50 Fed. 860. In the principal case an order against the railroad officials was the proper method of obtaining the corporation's books, and it seems a doubtful policy to allow the officials, who are mere custodians with no personal interest, to delay the original suit by writ of error; thus allowing the railroad to do something through its officers which it could not do directly. The case comes within the spirit of *Alexander* v. *United States* (1905) 201 U. S. 117, which represents the better view.

PLEADING AND PRACTICE—PARTIES—AMENDMENT.—The plaintiff intended to sue the "T. & T. Co.," the decedent's employer, but designated the "T. & T. Construction Co.," a corporation which had ceased doing business. Service was made on T., the vice-president of both corporations. *Held*, the summons and complaint might be amended under § 723 of the Code. *Ward* v. *Terry & Tench Const. Co.* (1907) 102 N. Y. Supp. 1066.

An amendment is allowed under § 723 of the Code in cases where there is a misnomer or some defect in the designation of the defendant, *Munzinger* v. *Courier Co.* (1894) 82 Hun 575, or where the defendant is originally designated as administrator, *Tighe* v. *Pope* (1878) 16 Hun 180, trustee, *Boyd* v. *U. S. Mort. & Trust Co.* (1907) 187 N. Y. 262; 7 COLUMBIA LAW REVIEW 366, or executor, *Kerrigan* v. *Peters* (1905) 108 App. Div. 292, instead of in his individual capacity. While new entities are not admitted to an action by amendment, *N. Y. S. M. Milk Pan Ass'n* v. *Rem. Ag. Works* (1882) 89 N. Y. 22, the principal case may be supported on the ground that, while the name in the summons designated an existing corporation, this was but a coincidence, and the corporation substituted was the one intended to be served.

QUASI-CONTRACTS—RIGHTS OF A DEFAULTER UNDER AN EXPRESS CONTRACT.—The plaintiff contracted to do a certain entire piece of work for the defendant at a certain rate, 90 per cent. of the payment for work done to be paid monthly, and the remaining 10 per cent. to be paid upon completion of all the work. The plaintiff stopped work in November because of frost, and the defendant did not pay for the November work on the 20th of the ensuing month, as had been customary. Both parties treated the contract as still entirely operative until the following 1st of April, when the plaintiff refused to continue performance, and later brought an action in quasi-contract for the value of the work actually done. *Held*, the plaintiff could recover. *Cleveland Ry. Co.* v. *Scott* (Ind. 1906) 79 N. E. 226. See NOTES. p. 418.

QUASI-CONTRACTS—SERVICES RENDERED TO DECEASED.—The plaintiff claimed for services rendered in caring for and nursing deceased for some years prior to his death. There was no agreement as to the mode of compensation; but the plaintiff expected a legacy. No provision was made for her in the will. *Held*, that she could recover for such services. *Christianson* v. *McDermott's Estate* (Mo. 1907) 100 S. W. 63.

There is a presumption that compensation was intended, where services are rendered by any other than a member of the family. *Succession of Pereuilhet* (1871) 23 La. Ann. 294; *Wallace* v. *Schaub* (1895) 81 Md. 594. If such services were given without an agreement as to the mode of payment, it matters not that the one giving them expected the compensation to take the form of a legacy. *Freeman* v. *Freeman* (1872) 65 Ill. 107; *Roberts* v. *Swift* (Pa. 1793) 1 Yeat. 209. But if the work is done merely in expectation of a voluntary legacy, without an

intention to create a right to other remuneration, no cause of action arises against the estate, failing the legacy. *Lee* v. *Lee* (Md. 1834) 6 Gill & J. 316; *Shakespeare* v. *Markham* (N. Y. 1877) 10 Hun 311. As in the principal case there was no understanding that the plaintiff was to rely on his employer's generosity, the case is correct. *Robeson* v. *Niles* (D. C. 1889) 7 Mack. 182, 189.

QUO WARRANTO—JUDICIAL ACT.—The Code gave unlimited discretionary power to the attorney-general to maintain an action to try title to office. M., a former attorney-general, had refused to bring such an action. *Held*, that his determination would not prevent J., his successor, from bringing an action on the same facts. *People* v. *McClellan* (1907) 103 N. Y. Supp. 146, aff'd. Ct. of App. May 10, 1907.

If M.'s refusal was a judicial determination of the question, it was not reversible or reviewable by his successor. *People* v. *Stocking* (1866) 50 Barb. 573; *Noble* v. *R.R. Co.* (1892) 147 U. S. 165; *People* v. *Supervisors* (N. Y. 1861) 35 Barb. 408; *Gulnac* v. *Board* (N. J. 1906) 64 Atl. 998. A judicial act involves the determination of right, obligation, or property. *Sinking Fund Cases* (1878) 99 U. S. 700, 761; *People* v. *Board* (1880) 54 Cal. 375. A similar limitation of the term appears in the cases construing constitutional inhibitions against giving judicial powers to bodies other than courts. *U. S.* v. *Ferreira* (1851) 13 How. U. S. 40, 48; *State* v. *Hathaway* (1892) 115 Mo. 36. Although this conception is too narrow in cases exempting officers from tort liability for their "quasi-judicial" acts, *Jones* v. *Brown* (1880) 54 Ia. 74; *Wasson* v. *Mitchell* (1864) 18 Ia. 153, the distinction between judicial and discretionary acts need not arise in those cases, since the officer's discretion is what exempts him. Burdick, Torts, 35. The same holds true of mandamus, which never lies to control discretion, nor, *a fortiori*, the performance of judicial acts. Spelling, Injunctions §§ 1384, 1395. But the principle is well established that neither ministerial, *People* v. *Carr* (1884) 23 N. Y. Supp. 112, nor purely discretionary acts, *Att'y Gen.* v. *Northampton* (Mass. 1887) 10 N. E. 450, and only those whose nature is judicial in the sense adopted above, *People* v. *Gilroy* (1893) 25 N. Y. Supp. 878, may be reviewed on certiorari. Spelling, Injunctions, §§ 1898–9, 1927, 1954–7. If not a judicial act, the prior action of the attorney-general cannot be considered as leaving him *functus officio; Jermaine* v. *Waggener* (N. Y. 1841) 1 Hill 279; *People* v. *Ames* (N. Y. 1860) 19 How. Pr. 551; as there is nothing which restricts him in exercising his discretion as to the time for bringing suit. The principal case emphasizes the correct distinctions as laid down in *Sinking Fund Cases*, supra; *In re Saline County* (1869) 45 Mo. 52.

REAL PROPERTY—ADVERSE POSSESSION BY RAILROAD.—A railroad company took land for its right of way, but paid no compensation. An ejectment suit was brought twenty-five years later by the owner. *Held*, that the company could not set up adverse possession or an easement by prescription, as it must be presumed to have entered by condemnation proceedings; but that execution of the owner's judgment would be stayed to allow condemnation proceedings. *Cornellsville Coal Co.* v. *B. & O. R. Co.* (Pa. 1907) 65 Atl. 669.

This case undoubtedly represents the law as to adverse possession in Pennsylvania, *Covert* v. *Ry. Co.* (1903) 204 Pa. St. 341; *Carter* v. *Turnpike Co.* (1904) 208 Pa. St. 565, but not generally elsewhere. *Organ* v. *R.R. Co.* (Ark. 1889) 11 S. W. 96; *Myers* v. *McGavock* (1894) 39 Neb. 843; *Hanlon* v. *R.R. Co.* (1894) 40 Neb. 52; *St. Paul* v. *Ry. Co.* (1895) 63 Minn. 330. Its justification in principle is doubtful. A railroad may acquire land otherwise than by condemnation, 2 Elliott, Railroads, § 400, and the presumption that it must so take is arbitrary, and opposed to public policy, since it is less detrimental to the public interest to force land owners to assert their claims in time than to obstruct the operation of a railroad. Cf. *Ind. B. & W. Ry. Co.* v. *Allen* (1888) 113 Ind. 581; *McAuley* v. *R.R. Co.* (1860) 33 Vt. 311. To stay the execution of the

plaintiff's judgment until condemnation proceedings can be instituted is to recognize that the railroad did enter as a trespasser, the contrary of which has just been conclusively presumed. On the other hand, to deny the right of a railroad to set up a prescriptive easement in the right of way is clearly opposed to the weight of authority. *American Bank Note Co.* v. *R.R. Co.* (1891) 129 N. Y. 252; *Wayzata* v. *Ry. Co.* (1892) 50 Minn. 438; *McCutchen* v. *Ry. Co.* (La. 1907) 43 So. 42.

REAL PROPERTY—EASEMENTS—EXTENT.—A granted B the right to build a reservoir at a certain spring on A's land, and to draw water therefrom, the reservoir not to occupy more than one-half acre. B built the reservoir. Ten years later he proposed to increase his water supply. *Held*, an injunction would lie to restrain him, although the well would be within an area, including the reservoir, of one-half acre, if the boundaries should be fixed according to B's claim. *Sted* v. *Water Co.* (N. J. 1907) 65 Atl. 713.

This case falls clearly within the principle of *Onthank* v. *R.R. Co.* (1877) 71 N. Y. 194. If B had changed merely the mode of user, leaving the amount of water withdrawn substantially unaffected, he might have had the benefit of an ambiguity in the grant, assuming there was any; *Tourtellot* v. *Phelps* (1855) 4 Gray 370; but, having attempted to enlarge the extent of the easement beyond the point where he originally fixed it, he cannot justify his encroachment on one side of his privilege by showing that it will not be an encroachment on another. Goddard, Easements, 276, 311.

REAL PROPERTY—POWERS IN TRUST—DOMESTIC RELATIONS LAW.—A testator in New York constituted his executors guardians of the property of his minor children. The New York Domestic Relations Law constitutes a wife joint guardian with her husband, and restricts to the surviving parent the right to appoint a testamentary guardian. *Held*, though the appointment as guardian was void, it was valid as creating a power in trust. *Kellogg* v. *Burdick* (N. Y. 1907) 80 N. E. 207. See NOTES, p. 410.

REAL PROPERTY—RULE AGAINST PERPETUITIES—OPTION.—A leased land to B for thirty years with an option to purchase for £1325 at any time during the lease upon giving notice. An action was brought for specific performance of the option, or, in the alternative, damages for breach of contract. *Held*, the option was void for remoteness and would not be enforced by specific performance; but damages at law would be awarded. *Worthing Corporation* v. *Heather* [1906] 2 Ch. D. 532. See NOTES, p. 406.

TORTS—DANGEROUS COMMODITY—LIMIT OF OWNER'S ABSOLUTE RESPONSIBILITY.—The plaintiff's trees were injured by the escape of gas from the defendant's main, laid under the street. *Held*, the defendant was not absolutely liable, but was only bound to use care commensurate with the danger of handling so dangerous a commodity. *Gould* v. *Winona Gas Co.* (Minn. 1907) 111 N. W. 254.

When one maintains on his land any dangerous agency, which is not required for the natural use of that land, it is generally held to be his absolute duty to see that it does not injure anyone else. *Rylands* v. *Fletcher* (1868) 37 L. J. Ex. (N. S.) 161; *Shipley* v. *Fifty Associates* (1870) 106 Mass. 194; *Cahill* v. *Eastman* (1872) 18 Minn. 324; but see contra, *Losee* v. *Buchanan* (1873) 51 N. Y. 476. But where the same dangerous thing is acquired by one, not primarily to be used by him on his own land, but for the benefit of others, and those others, by making use of that thing, thereby countenance its acquisition, they cannot in justice hold the one who acquires it to the same absolute duty, but only to care commensurate with the requirements of handling the thing in question. *Price* v. *Gas Co.* (1895) 65 L. J. Q. B. D. 126; *Blyth* v. *Waterworks Co.* (1856) 25 L. J. Exch. 212; *Illingsworth* v. *Elect. Co.* (1894) 161 Mass. 583. The decision of the principal case seems, therefore, not to be a

departure from the rule of *Rylands* v. *Fletcher*, supra, but to illustrate clearly the limits of the rule laid down in that case.

TORTS—NEGLIGENCE—ALLUREMENT TO CHILDREN.—The plaintiff, a small boy, was injured by the shock from an uninsulated electric light wire strung on a tree which he was climbing, and which was situate on a street in a crowded part of the city. *Temple* v. *McComb City etc. Power Co.* (Miss. 1907) 42 So. 874.

While the doctrine of the turntable cases, *Pekin* v. *McMahon* (1895) 154 Ill. 141; *R.R. Co.* v. *Stout* (1873) 17 Wall. 657; *Keffe* v. *R.R. Co.* (1875) 21 Minn. 207, is being gradually repudiated, *Barney* v. *Hannibal Ry.* (1894) 126 Mo. 372; *Ryan* v. *Tower* (1901) 128 Mich. 463; *Walker* v. *Potomac Ry. Co.* (Va. 1906) 53 S. E. 113, the reason for this revulsion, namely that the doctrine practically makes landowners insurers of children, Burdick, Torts, 467, and restricts them in the use of their land, *D. L. & W. Ry. Co.* v. *Reich* (1898) 61 N. J. L. 636, seems to have no application in the principal case, as the plaintiff was not a trespasser. It was for the city to say how its property was to be used; *Nelson* v. *Branford Co.* (1903) 75 Conn. 548; *Perham* v. *Electric Co.* (1898) 33 Ore. 451; and as the boys must be presumed to have been the city's licensees unless the contrary were shown, *Whittleder* v. *Illuminating Co.* (N. Y. 1900) 50 App. Div. 478; *Daltry* v. *Light Co.* (1904) 208 Pa. St. 403, and as the defendant had reason to believe that the city would permit the boys to play there, *Anderson* v. *Light Co.* (1898) 63 N. J. L. 387; *Daltry* v. *Light Co.*, supra, it owed a duty to protect them from the dangerous agency which it controlled. *Denver Electric Co.* v. *Simpson* (1895) 21 Colo. 371.

TORTS—NEGLIGENCE—LIABILITY OF PACKER FOR UNWHOLESOME FOOD. —The defendant, a packer, had sold diseased ham in a can to a retail dealer. He resold it to the plaintiff, who became ill from eating it. Negligence in packing was alleged. *Held*, on demurrer, the complaint did not state a cause of action. *Tomlinson* v. *Armour & Co.* (N. J. 1907) 65 Atl. 883.

Vendors of dangerous goods are liable for failure to exercise care commensurate with the possible danger. This has been held of dealers in drugs, *George* v. *Skivington* (1869) L. R. 5 Ex. 1; *Thomas* v. *Winchester* (1852) 6 N. Y. 397, food, *Bishop* v. *Weber* (1885) 139 Mass. 411, and explosives, *Wellington* v. *Downer Oil Co.* (1870) 104 Mass. 64, and of manufacturers generally, *Elkins* v. *McKean* (1875) 79 Pa. St. 493, without privity of contract, for a duty rests on them independent of contract. *Coughtry* v. *Woolen Co.* (1874) 56 N. Y. 124; Thompson, Negligence, 232. Mere manual possession by an intermediate party, where the defects cannot be discovered, does not relieve the manufacturer from liability to the consumer; *Schubert* v. *Clark Co.* (1892) 49 Minn. 331; and similarly, the purchaser cannot be deemed to have taken the risk. *Best* v. *Flint* (1885) 58 Vt. 543. While the result of the principal case appears incorrect, it has, however, been reached elsewhere. *Nelson* v. *Armour Packing Co.* (Ark. 1905) 90 S. W. 288.

TRUSTS—ACCUMULATIONS—DISPOSITION IN CASE OF INVALID DIRECTION.—A testator devised the residue of his estate to executors in trust to pay the income to his wife for life, and directed that upon her death a part of the residue should go to a charitable corporation to be formed by the executors within two lives in being, and declared that in case the gift to said corporation should fail, the property should go to X. The wife perished with the testator, and the A. Institute was subsequently formed as directed. *Held*, there was a valid trust in the executors to pay over the fund to the A. Institute when formed, and that the latter was "presumptively entitled to the next eventual estate" and should take all the accumulations. *St. John* v. *Andrews Institute for Girls* (1907) 102 N. Y. Supp. 808. See NOTES, p. 403.

TRUSTS—CREATION BY PAROL—DONOR AS TRUSTEE.—Defendant's executor delivered his check to the plaintiff intending it as a gift to her. Later he took the check saying he would use it for her and make it earn more money. *Held*, the check was only a promise to pay, and being without consideration, there could be no recovery. *Thogmorton* v. *Grigsby's Adm'r* (Ky. 1907) 99 S. W. 650.

This was not a gift, as there must be a complete and unconditional giving up of dominion over the subject-matter. *Gannon* v. *McGuire* (1899) 160 N. Y. 476; *Cloyes* v. *Cloyes* (1885) 36 Hun 145; *Thresher* v. *Dyer* (1897) 69 Conn. 404. But if a donor constitutes himself a trustee for his donee, no actual delivery is necessary, *Yokem* v. *Hicks* (1900) 93 Ill. App. 667, and if the intention to create a trust in the present, *Ex parte Pye* (1811) 18 Ves. 140, and not in the future, *Ellison* v. *Ellison* (1802) 6 Ves. 656, is clear, *Young* v. *Young* (1880) 80 N. Y. 422, technical words creating a trust are unnecessary. *Mabie* v. *Bailey* (1884) 95 N. Y. 206. It is submitted that the expressions of the donor in the principal case evince an intention to constitute himself a trustee for his beneficiary. Though an incomplete gift will not be turned into a trust by equity, *Wadd* v. *Hazelton* (1893) 137 N. Y. 215, this should not prevent a true declaration of trust from having its full effect. *Smith's Estate* (1892) 144 Pa. St. 428.

WATERS AND WATERCOURSES—PRIVATE RIGHT OF ACCESS TO NAVIGABLE WATERS—WHARFING OUT.—A riparian owner on a bay, the foreshore of which was owned by a town under an old colonial grant, erected a pier extending from his upland about one hundred and fifty feet into and over the waters of the bay. *Held*, Hiscock J. dissenting, the riparian owner's right of access included the right to wharf out as a means of completely and innocently enjoying the right of access. *Trustees of the Town of Brookhaven* v. *Smith* (1907) 36 N. Y. L. Jour. No. 145. See NOTES, p. 412.

WILLS—CONSTRUCTION—NATURE OF ESTATE.—A testator devised land to three daughters "and their children." *Held*, the daughters and children living at the testator's death took a joint fee. *Wills* v. *Foltz* (W. Va. 1907) 56 S. E. 473.

The point decided here goes back, not to the more famous dictum, but to the decision in *Wild's Case* (1599) 6 Co. 16b, 17b, and to *Oates* v. *Jackson* (1743) 2 Strange 1172. Although it is said that a deed to A and his children, before and after-begotten, will give A only a life estate, remainder to the children, since "in order to make a valid conveyance none but parties vendees can take a present estate," *Bodine's Admn'rs* v. *Arthur* (1890) 91 Ky. 53; *Wager* v. *Wager* (Pa. 1815) 1 S. & R. 374, this difficulty is obviated in devises, as the will speaks, by the best authority, 2 Jarman, Wills 1237, and usually, as in the principal case, by statute, W. Va. Code, 1906, § 3142, from immediately before the testator's death. 1 Stimson, Am. Stat. L. § 2806. Since the word "children" is *prima facie* one of purchase, *Martin* v. *Martin* (1903) 52 W. Va. 381, 387, and there is nothing to rebut this presumption as to the testator's intention, the case is sound. *Fitzpatrick* v. *Fitzpatrick* (1902) 100 Va. 552, accord. The will cases giving an exclusive estate to the parent and nothing to the children rest upon circumstances showing a different intention in the testator. *Wallace* v. *Dold's Ex'rs* (Va. 1831) 3 Leigh 258; *Stace* v. *Bumgardner* (1892) 89 Va. 418.

WILLS—INTEREST ON ANNUITIES.—By a will probated in 1878 the testator gave his daughter an annuity for five years none of which had been paid in 1905. *Held*, interest was properly allowed on the amounts in arrears from the date of their maturity. *Willcox* v. *Willcox* (Va. 1907) 56 S. E. 588.

In England interest is not generally allowed on annuities, *Bedford* v. *Coke* (1750) 1 Dick. 178; *Anon.* (1755) 2 Ves. Sr. 661; *Booth* v. *Leycester* (1838) 3 Myl. & C. 459; *Jenkins* v. *Briant* (1848) 16 Sim. 272, as tending

to prolong suits and cause delays, *Anderson* v. *Dwyer* (1803) 1 Sch. & Lef. 301, except under exceptional circumstances: *Booth* v. *Coulton* (1861) 30 L. J. (N. S.) Ch. 378: as where delay in payment was due to the misconduct of the executor. *Martyn* v. *Blake* (1842) 3 Dr. & War. 125; *In re Powell's Trust* (1852) 10 Hare 134. When given absolutely the annuity is payable for the year following the testator's death, and interest, when payable according to these principles, begins to run at the end of that year; but if a sum is given for life only, it is a general legacy, payable at the end of the year; *Bewson* v. *Maude* (1821) 6 Mad. 15; 2 Roper, Legacies, 2nd Ed. 172, and interest on it will not begin to run until the end of two years. *Gibson* v. *Bott* (1802) 7 Ves. Jr. 89; 2 Roper, Legacies, supra. In the United States interest is generally allowed on annuities, *Simmons* v. *Hubbard* (1883) 50 Conn. 574; *Ayer* v. *Ayer* (1880) 128 Mass. 575; *Corle* v. *Monkhouse* (1890) 47 N. J. Eq. 73, especially when given for maintenance. *Cooke* v. *Meeker* (1867) 36 N. Y. 15; *Beavers* v. *Jennison* (1847) 11 Ala. 20. The English distinction as to the time from which the interest runs, is generally adopted in this country. *Welsh* v. *Brown* (1881) 43 N. J. L. 37; *Lawrence* v. *Embree* (N. Y. 1855) 3 Bradf. 364; 3 Redfield, Wills, 3rd Ed.* 185. In Pennsylvania contrary to the weight of authority interest runs from the date of the testator's death. *Townsend's Appeal* (1884) 106 Pa. St. 268. The principal case is, therefore, correctly decided.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—The testatrix made her lawyer her executor, and trustee of a fund for the benefit of a friend, leaving the residuary estate to the grandchildren of said lawyer, thereby excluding her husband and son; but there was no proof of actual undue influence. *Held*, that proof of the confidential relations was sufficient to raise a presumption of undue influence. *In re Marlor's Estate* (1906) 103 N. Y. Supp. 161.

The apparent assumption of the court in the principal case that the same rules of burden of proof apply to testamentary devises as to gifts *inter vivos* is erroneous. *Parfitt* v. *Lawless* (1812) L. R. 2 Pro. & Div. 462; *Matter of Spratt* (N. Y. 1896) 4 App. Div. 1. By the great weight of authority proof of confidential relations alone will merely raise a suspicion, which compels an examination of the circumstances surrounding the execution of the will, *Barry* v. *Butlin* (1838) 2 Moore P. C. 480, and all the circumstances may be sufficient to give rise to a presumption of undue influence. *Matter of Smith* (1884) 95 N. Y. 516; *Boyse* v. *Rossborough* (1857) 6 H. L. Cas. 2, 48; *Bancroft* v. *Otis* (1890) 91 Ala. 279. Cf. *Marx* v. *McGlynn* (1882) 88 N. Y. 357, relied on by the court in the principal case, which seems to be modified by later cases. *Matter of Smith*, supra; *Matter of Cornell* (1899) 43 App. Div. 241, aff'd (1900) 163 N. Y. 608.